IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD
(Special Original Jurisdiction)

FRIDAY, THE SEVENTEENTH DAY OF SEPTEMBER
TWO THOUSAND AND FOUR

PRESENT
THE HON'BLE SRI JUSTICE C.V.RAMULU

WRIT PETITION No. 225 of 1998

Between:
Gurram David, S/o. Gurram Prasangi,
R/o Rajupalem , Komarolu, Prakasam District

..... PETITIONER

AND

1 The Secretary to Government,
Government of India, Defence (Army). New Delhi.
2 The Chief of the Army Staff,
New Delhi.
3 The Colonel
O/o The Commanding Officer 18, Madras (Mysore)
C/o. 56 AAPO, Madras Regiment Abhilekh Karayalaya,
Record of Madras Regiment Post Bag No.1 Willington, Niligiri
4 The Captain Records Officer
Madras Regimnet

.....RESPONDENTS

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court may be pleased to issue an order or direction more particularly one in the nature of writ of Certiorari calling for the records in impugned proceedings No.113/3/A Dt: 14-6-90 of 2nd respondent and conformed by the 4th respondent in proceedings No.2574493/Lib/41/NE-4 , dt:13th-october-1990 and in proceedings No.25793/Lib/60/NE-4 , dt: 17-10-92 and proceedings No.2574493/Lib/64/NE-4, Dt: 26th june 1997 as illegal arbitrary and contrary to rule 180 of Army Rules , 1954 and quash the same and consequently direct the respondent to reinstate the petitioner as in service till the date of conditioned service(15 years) and to grant the pensionary benefits for the service and pass such other order or orders.

Counsel for the Petitioner: **Mr.K.M.SAXENA**
Counsel for the Respondents: **Mr.K.G.KRISHNA MURTHY, Addl.Standing Counsel for Central Government**

The Court made the following :

O R D E R :

By Proceedings No.113/3/A, dated 14-6-1990 of the 2nd respondent, the petitioner was discharged from service in view of adverse entries in his service book, as per Rule 13(3)III(v) of the Army Rules,1954 (for short 'the Rules'). It seems, on the petition dated 28-7-1990 of the wife of the petitioner, intimation as to Proceedings dated 14-6-1990 was sent by the 4th respondent on 13-10-1990. Further, the 4th respondent, by Proceedings dated 17-10-1992 rejected the request of the petitioner for reinstatement into service. Further, a mercy petition dated 7-5-1997 of the petitioner was rejected by the Chief Records Officer for Officer-in-charge records, Madras Regiment, Wellington, Nilgiris by an Order dated 26-6-1997 and it was intimated that thrice his request for reinstatement into service was rejected and reconsideration of the same does not arise.

In nutshell, the petitioner is challenging the Proceedings dated 14-6-1990 of the 2nd respondent discharging him from service. However, a copy of such Proceedings was not filed before this Court, except the Certificate of Service, in which it is stated that the petitioner was discharged from service on 14-6-1990.

According to the petitioner, he worked for 14 years, 4 months and 27 days in the Indian Army. He was awarded the following Medals:

"1. Saringer seva service medal (J7K)
2. 9 years long service medal.
3. Colasp to sainger seva medal."

While so, in the year 1989 he availed leave. However, he overstayed the same and could not join immediately. To his utter surprise, he had received a show cause notice dated 3-11-1989 from the 3rd respondent enumerating the following charges:

(a) 14 days rigorous imprisonment on 22 Aug 83 for an offence under the Army Act Section 39(b), ie, overstaying of leave for 37 days from 07 Jul 83 to 12 Aug 83.
(b) 7 days detention on 23 Jul 84 for an offence under Army Act Section 39(b), ie, overstaying of leave for 5 days from 26 Apr 84 to 30 Apr 84.
(c) 10 days detention on 24 Nov 87 for an offence under Army Act Section 63, ie, violating traffic rules while driving motor cycle on 21 Nov 87.
(d) Deprivation of your appt of Lance Naik (Time Scale) on 22 Aug 89 for an offence under Army Act Section 63, ie, negligently driving motor cycle causing injuries to civilians and damage to the vehicle on 07 May 89.
(e) 28 days rigorous imprisonment and 14 days detention for an offence under Army Act Section 39(b) ie, overstaying of leave for 43 days from 10 Jul 89 to 21 Aug 89."

The petitioner submitted his explanation on 6-11-1989. But, unfortunately, he was discharged from service of the Army by an Order dated 14-6-1990. Further, he filed an appeal on 28-7-1990, which was rejected by the 2nd respondent on 13-10-1990. The representation made by the petitioner on 20-4-1992 was also rejected by an Order dated 2-5-1992 and finally, the mercy petition filed by him was rejected on 26-6-1997. According to the petitioner, the Order of discharge under Rule 13(3)III(v) of the Rules itself was bad in law, since the Commanding Officer passed the said order instead of Brigade Commander as required under the Rules. Even otherwise, Rule 21 or Rule 22 or Rule 13(3)III(v) of the Army Rules,1954 does not confer any power on the 2nd respondent to discharge him from service. The action of respondents amounts to colourable exercise of power. Further, under Para 448 of Army Regulations,1987, the case of the petitioner should have been considered for the purpose of payment of pension.

A detailed counter affidavit has been filed on behalf of the respondents denying the allegations made by the petitioner. It was

specifically denied that the discharge of the petitioner from petitioner from service by a Commanding Officer, 18 Madras amounts to double punishment. The petitioner was discharged not only under Section 22 of the Army Act, but also as per the provisions of Rule 13(3)III(v) of the Rules. While the Army Act contains the statutory provisions, Army Rules contain the procedure to be followed to put the provisions of the Act into practice. The Rules draw their statutory power from Section 192 of the Army Act. As per note 2 to Section 29 of the Army Act, the difference between dismissal and discharge is that the former does, while the latter does not imply culpability. This itself shows that the petitioner was dealt with leniently by sanctioning his discharge instead of dismissal, which would have been more harsh on him. In fact, before that, a show cause notice was issued in accordance with Rule 13(3)III(v) of the Rules and the petitioner submitted his reply, which was sent to the Headquarters for examination and further orders. After due examination, the Officiating Commander, HQ 120 Inf Bde found the petitioner's explanation to be unsatisfactory and, therefore, directed to discharge him from service being an undesirable soldier. The petitioner represented his case through several representations to the Army headquarters requesting to reinstate him into service and grant pensionary benefits. The same have been replied suitably. Under Rule 13(3)III(v) of the Rules, the authorities are empowered to discharge the service of a Soldier, who has more than four red entries in his service record. It is further asserted that it is not the 3rd respondent, who passed the order of discharge and it is the Commander, 120 Inf Bde, who was competent authority to decide the case and in fact, the Commander had taken a decision, which was intimated to the petitioner.

I have looked into Rule 13(3)III(v) of the Rules. I am of the considered opinion that the authorities had followed the procedure as required under law and the Commander cannot be said to be a person,

who has no authority to pass the order of discharge against the petitioner. Learned counsel for the petitioner argued that this Court has to see whether there was any lawful contingency existing at the time of discharge of the petitioner. Once the power is not denied and the same was exercised properly by the competent authority, the question whether any lawful contingency was existing at the time of discharge of the petitioner cannot be gone into by this Court in this proceeding. There is no denial as to the four red entries made earlier in the service book of the petitioner and in fact, on three earlier occasions, the petitioner has repeated the same offence of overstayal of leave, which is a serious misconduct in the Disciplinary Forces. Various citations referred to by the learned counsel for the petitioner have no relevance to the facts of this case.

The next contention raised by the learned counsel for the petitioner is that the petitioner, in fact, was completing 15 years of service within a few months from the date of discharge and only to deny his pension with a vindictive attitude, the impugned discharge order was passed. There is no substance in the said submission. Even according to the charges, which were not disputed, the petitioner is a habitual absentee and overstayed the leave without any permission on three occasions. Therefore, it cannot be said that the discharge order was passed with any vindictive attitude and *mala fide* intention. However, the misconduct alleged against the petitioner does not amount to sabotaging the Army or any other serious acts, which were detrimental to the interests of the Nation. Under these circumstances, the respondents are directed to consider the feasibility of sanctioning *pro rata* or proportionate pension to the petitioner by giving relaxation of the Rules, if permissible and also consider the Awards obtained by the petitioner while in service and decide the case of the petitioner for sanction of pension for the service rendered by him in the Indian Army.

With the above direction, the writ petition is disposed of. No order as to costs.

September,2004

prk

ASSISTANT REGISTRAR

// TRUE COPY //

SECTION OFFICER

To

1 The Secretary to Government,
Government of India, Defence (Army). New Delhi.

2 The Chief of the Army Staff,
New Delhi.

3 The Colonel
O/o The Commanding Officer 18, Madras (Mysore)
C/o. 56 AAPO, Madras Regiment Abhilekh Karayalaya,
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